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Letter dated 3 March 2003 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

I write with reference to my letter of 13 November 2002 (S/2002/1247).

The Counter-Terrorism Committee has received the attached third report from France submitted pursuant to paragraph 6 of resolution 1373 (2001) (see annex).

I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Jeremy **Greenstock**
Chairman
Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism

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Annex to the letter dated 3 March 2003 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

[Original: French]

In reply to your letter of last November, please find attached the second supplementary report submitted by France to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) (see enclosure).

(*Signed*) Jean-Marc **de La Sablière**

Enclosure

Second supplementary report submitted by France to the Counter-Terrorism Committee pursuant to Security Council resolution 1373 (2001)

Effective implementation of paragraph 1 of the resolution also requires the existence of legal provisions or administrative measures that ensure that funds and other economic resources collected by non-profit organizations (e.g. religious, charitable or cultural organizations) are not diverted from the stated purpose, particularly for financing of terrorism. Please explain whether such provisions or measures are in place in France, in addition to Law No. 93-122 of 29 January 1993 and, if not, how France proposes to adapt its legislation in order to comply with the requirement of this paragraph.

In order to ensure transparency in the movement of funds collected by these organizations or associations, there is a legal framework for oversight of associations and foundations which gives the public authorities the legal means to regulate them and address the actions of those that violate the law or disturb public order.

In France, associations which are non-profit organizations as defined by the Act of 1 July 1901, occupy an important place in the life of society and participate actively in the democratic process. While they do benefit from a certain number of tax advantages because of their status, they give tangible expression, above all, to freedom of expression and association, rather than the exercise of a tax right.

Similarly, in French law, a foundation is viewed as the manifestation of a desire to allocate resources to a particular purpose and not as a legal institution inserted between a donor and a recipient which, in view of its charitable aims, would enjoy various advantages, in particular regarding taxation.

From the foregoing, it will be clear that the tax authorities cannot provide oversight for the operations of an institution such as an association which receives an exemption (or in France, the State cannot oversee foundations which it can create or dissolve at its discretion).

1. Associations

The purpose of the Act of 1 July 1901 and its executing decree of 16 August 1901 was essentially to organize the exercise of a public freedom, not to create a legal structure.

Freedom of association is among the fundamental principles recognized in the laws of the Republic and guaranteed in the preamble to the Constitution of 1946, to which the Constitution of 1958 refers. Therefore, it has constitutional standing recognized by the Constitutional Council in its decision of 16 July 1971.

It is also proclaimed in numerous international instruments (European Convention on Human Rights, International Covenant on Civil and Political Rights); accordingly, any law which might hinder the exercise of freedom of association can be set aside automatically by the courts.

The principle of freedom of association means, without exception, that:

Any individual is free to form an association. This implies that the principle of formation of an association is not subject to prior administrative authorization, although the granting of legal personality, and therefore the recognition of an association as such, may be.

Any individual is free to join an association. Conversely, any individual is free not to join an association or to withdraw from one at any time.

(a) Definition of "association":

- An association is an agreement whereby two or more persons place in common in an ongoing way their knowledge or activity for a purpose other than sharing profit.
- On creation of an association, the members (participants) contribute their knowledge or activity. In this regard, article 1 of the Act of 1901 requires that the pooling of knowledge or activity must be ongoing, which distinguishes the association from a mere meeting.
- All the members of the association have equal rights, which for example, differentiates an association contract from a labour contract.

The non-profit aims of an association do not imply that it is prohibited from exercising economic activity. Indeed, some associations of the "Act of 1901" type rapidly proved to have declared economic activity which generates significant funds, for example, cultural associations, vocational training centres and sports clubs.

In order to take into account this situation, and thus to organize oversight of the management of these associations, the Act of 1 March 1984 and its executing decree of 1 March 1985 requires non-commercial legal persons under private law with significant economic activity to issue an annual balance sheet.

Moreover, such bodies are required to designate an auditor (legally trained and an independent accountant) who has the obligation to disclose to the State prosecutor any facts that might compromise the continuity of the operation of the legal person and any criminal action of which he has knowledge through the exercise of his duties.

(b) Functioning of associations:

Legal personality:

It should be noted that a distinction is made among associations which are undeclared, declared or recognized as being of service to the public.

Although associations may be formed freely, only associations declared to the administrative authorities enjoy legal personality.

With regard to declared associations, a distinction is made between "simple" associations, which have a reduced form of legal personality, and "recognized public service" associations, which have full legal personality (which in particular allows them to own property and receive funds in the form of gifts or bequests).

In order to be recognized as being of service to the public, the association must have a purpose recognized as such and it must also be national in scope. This designation is granted or withdrawn by the administrative authorities.

Financing:

Aside from resources which may be derived from economic activity, declared associations or those recognized as being of service to the public can charge dues to their members, even if they are not obligatory. The amount of dues for a declared association not recognized as being of service to the public should not be excessive, however, they might then be considered a donation (gift), and hence that status could be revoked because an association of this type is not authorized to receive funds by this means.

An association may also benefit from other resources generated by its own activities.

Finally, an association which is declared and/or of recognized service to the public can also receive public financing in the form of subsidies from the State or a local authority. Since such subsidies are viewed as an individual administrative decision, they are under the competence of administrative jurisdictions as far as monitoring of the legality of the decision is concerned.

The granting of such a subsidy implies the right of the requested body to monitor it (description of activities, projected budget, accounting balance sheets, justification of expenditures, etc.) at two levels: first, when the request for a subsidy is made, and second, when an accounting is given of the actual use of the funds.

Out of concern for transparency in the use of public funds, the Act of 1 March 1984 requires associations that receive an annual subsidy of more than 150,000 euros from a public entity to prepare a balance sheet, an income statement and an annex, under the supervision of an auditor (article L. 612-4 of the Commerce Code).

Dissolution:

An association may cease to exist following voluntary dissolution (through a special decision or statutory stipulation), under a legal ruling but also through a judicial or administrative sanction. The principle of dissolution as a sanction against a political party pursuing an aim contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms has been upheld by the European Court (see decision of the European Court of Human Rights concerning the Turkish Islamist party (REFAH).

Judicial sanctions:

The Act of 1 July 1901 stipulates that associations founded for an illicit cause or purpose, contrary to the law or morality, or having the aim of undermining the integrity of the national territory or the republican form of government, are null and void. The decision to invalidate them is rendered by the high court, either at the request of any interested party, or at the request of the public prosecutor's office. In ordering dissolution, the court considers not only the purpose contained in the statutes, but that actually pursued by the association. It is not necessary for prohibited acts to have been committed. This is a civil proceeding.

This procedure for the dissolution of an association as a legal person is independent of any possible criminal prosecution against the members or directors of the association as physical persons or even against the legal person itself, whose dissolution can also be ordered as a criminal sanction when, in the cases covered by

the law or regulations, offences have been committed in its name by its organs or representatives (article 121-2 of the Criminal Code).

Administrative sanctions:

The Act of 10 January 1936 allows the dissolution, by decree of the Council of Ministers, of combat groups and private militias formed as associations, whether declared or not, that incite armed demonstrations in the streets, are organized into combat groups and private militias, call for racial discrimination, hatred or violence, or, in French territory or originating from that territory, pursue activities intended to promote acts of terrorism in France or abroad. The reconstitution of a dissolved association or group is also a criminal offence.

For example, this type of measure has recently been taken against an extremist movement, a member of which attempted to assassinate the President of the French Republic using a firearm on 14 July 2002.

2. Foundations

In French law, the term "foundation" can have two meanings:

The act whereby one or several natural or legal persons decide to allocate irrevocably property, rights or resources to the realization of a task of general interest and not for profit.

The legal person resulting from an act under private law among one or more persons.

Foundation law has been developed practically without legislative support, at least up to the Act of 23 July 1987 concerning patronage.

The Act of 1 July 1901 concerning contracts of association does not refer to foundations, which in fact enjoy a special regime that has long been regulated only by the jurisprudence of the Council of State, even though the economic share of the private non-profit sector in France (over 30 billion euro) is largely composed of foundations.

The Act of 23 July 1987 provided a legal definition of a foundation, and the Act of 4 July 1990 instituted a minimum applicable legal regime for foundations recognized as being of public service.

This regulation, and incidentally, monitoring of its implementation, was not justified by economic or tax considerations alone, but also by the need to ensure respect for the wishes of the founders and donors in the achievement of the intended aim and to ensure that over time the condition of service to the public would be respected (in particular, the relevance of the tax advantages granted because of that status).

Finally, in a structure without members or general assembly, monitoring of the directors must necessarily come from outside the foundation.

(a) Monitoring of foundations

Monitoring of foundations takes place at two levels:

(1) On establishment of the foundation:

The Council of State, the higher administrative jurisdiction called on to give its views on the legitimacy and regularity of the establishment, as earlier, the minister responsible for preparing the proceeding will have done, endeavours to verify the draft statutes, which must be in accordance with the models proposed by the administration and also must meet the conditions for validity of the foundation: the original desire of the founders, the usefulness to society of the aim pursued and the precise identification of recipients of donations.

Recognition by the Government of the foundation's usefulness to society depends on this monitoring.

This Government decision, which actually constitutes a "birth certificate" for the foundation, is a regulatory decision of the public authority, as it should be stressed that the establishment of a foundation must be authorized. In France, there is not the same freedom to establish a foundation as there is for associations.

This decision on recognition is the proof of the seriousness and legitimacy of the project, which confers privileges, in particular regarding taxation.

(2) During the operation of the foundation:

Under French law, foundations recognized as being of benefit to society must receive prior authorization to accept donations and bequests made to them.

Administrative supervision is a very stringent form of control that restricts the ability of foundations to receive funds. With regard to public fund-raising, foundations, like all other organizations wishing to collect funds by this means, must make an advance declaration (principles and modalities of the operation planned) to the administrative authority (prefect).

This appeal for public financing also involves monitoring by the Board of Auditors and the Office of the Inspector-General for Social Affairs (verification of expenditures, accounting supervision, identification of beneficiaries, etc.).

Finally, foundations of benefit to society are controlled internally to the extent that a representative of the State sits *ex officio* on the board of directors of the institution.

(b) Sanctions:

Failure to observe the requirements imposed on foundations may result in withdrawal by the State of recognition of its benefit to society, and thus the end of the foundation as such.

The vigilance devoted to prevention, identification, and suppression of these criminal activities ensures that the field of action of terrorist organizations can be determined and covered so as to deprive them of their means of subsistence and neutralize them as far as possible, before they commit even more serious acts. In order to be as effective as possible, the fight against terrorism must identity the logistical structures of terrorist organizations.

It should be stressed that criminal responsibility of associations as legal persons may be engaged if acts of terrorism or financing of terrorism have been committed in their name by their bodies or representatives.

In the context of subparagraph 1 (c) of the resolution, please outline the procedure that leads to the freezing of terrorist funds upon request of foreign authorities, both from members and non-members of the European Union.

When a foreign Government, whether or not it is a member of the European Union, contacts the Ministry of Foreign Affairs to request the freezing of funds belonging to terrorists, the latter contacts the Ministries which could be involved for their opinion (Finance, Interior, Defence, Justice). An inter-ministerial consultation procedure leads to the adoption of a decision on the request. The French Government, by virtue of articles L151-1 and L151-2 of the monetary and financial code, can impose measures to freeze assets by national decree, but in general, the procedure consists in placing the body or individual on a list of terrorist organizations, either under the Security Council Committee established pursuant to resolution 1267 (1999) if it has links with al-Qa'idah and its sphere of influence, or on the European list (common position of 10 December 2001 in implementation of United Nations Security Council resolution 1373 (2001)). The European regulations adopted under these two procedures (regulation 881/2002 of 27 May 2002 and regulation 2580/2001 of 27 December 2001) are immediately applicable and allow the freezing of terrorist assets without recourse to the national procedure for freezing of assets.

Effective implementation of subparagraph 2 (e) of the resolution requires that States ensure that persons who participate in the financing, planning, preparation or perpetration of terrorist acts or support such acts are brought to justice, either by submitting the case without undue delay to their respective competent authorities for the purpose of prosecution or by extraditing these persons. This applies without any exception whatsoever and whether or not the offence was committed in their respective territories. Please explain how, in order to comply with subparagraph 2 (e), France would deal with a foreign national who is in France and has committed a terrorist act within France (for instance as an accomplice) or outside France against another State or its citizens. Is it possible, under current or proposed law, to prosecute that person in France

- **if he or she is not extradited by France?**
- **or before that person is convicted by a foreign court?**

In order to reply to this question, it is necessary to draw a distinction between two possible scenarios that are fundamentally different.

(1) The case of a foreign national who has committed acts of terrorism or financing of terrorism in the national territory against the interests of a third State or its nationals:

In this hypothetical case, French courts have jurisdiction to investigate these acts by virtue of article 113-2 of the Criminal Code, which establishes the competence of criminal courts on the basis of the criterion of territoriality, regardless of the nationality of the victims. It is therefore possible to prosecute the perpetrator of the offence in this case, provided that France does not plan to extradite him and he has not been convicted abroad for the same acts.

It should be recalled that in application of the principle of *ne bis in idem* (article 113-9 of the Criminal Code) public action is extinguished in France (and

prosecution is impossible) as soon as a final verdict has been reached in another country against the same person for the same acts.

The conditions for implementing the criterion of territoriality are particularly flexible in French law. It is sufficient that one of the elements constituting the offence has been committed in its territory to render French courts competent to pursue the matter.

Furthermore, the offence of complicity, in France, in a terrorist offence committed abroad also falls under the jurisdiction of the French courts by virtue of article 113-5 of the Criminal Code, under two conditions: first, reciprocity of charges (in France and in the third country) on the principal offence; second, confirmation of the offence by a final decision from a court in the third State.

(2) The case of a foreign national who has committed acts of terrorism or financing of terrorism outside the national territory against the interests of a third State or its nationals:

More simply put, this hypothetical case is of a foreign national who has committed acts of terrorism abroad against foreign victims. In this case, it is also possible to prosecute in France, even though the victim or victims do not have French nationality and the interests of the French State are not targeted. The same holds true if the person in question is only an accomplice in the offence (principle stated explicitly in article 689 of the Code of Criminal Procedure).

However, the legal basis for this jurisdiction is different. It has to do with the provisions of article 689-1 of the Code of Criminal Procedure, which establishes "virtually universal" competence for French courts to investigate the most serious offences envisaged in a series of international conventions. Some of them are specifically related to acts of terrorism:

The European Convention on the Suppression of Terrorism, signed at Strasbourg on 27 January 1977, and the Dublin agreement for the application of this convention, signed on 4 December 1979;

The Convention on the Physical Protection of Nuclear Materials, adopted at Vienna on 3 March 1980;

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and for the application of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed at Rome on 10 March 1988;

The Convention on the Suppression of the Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, done at Montreal on 24 February 1988, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971;

The International Convention for the Suppression of Terrorist Bombings, opened for signature at New York on 12 January 1998;

International Convention for the Suppression of the Financing of Terrorism, opened for signature in New York on 10 January 2000.

The implementation of this criterion for the expanded competence of French criminal courts is, however, conditional on the presence in the national territory of the presumed perpetrator of the offence, which corresponds to the hypothetical situation raised by the Committee in its question.

Prosecution can be initiated as a result of an official charge by a foreign Government or a complaint by a victim. On this point, it must be specified that a civil complaint allows the victim of a criminal offence to begin public action. In criminal matters, the prosecution is undertaken by the Public Prosecutor when the acts were committed abroad (article 113-8 of the Criminal Code).

Here again, the circumstance of France refusing in advance to extradite the individual involved is irrelevant, and prosecution is possible in France as long as no final verdict has been rendered abroad against the same person for the same crime.

Please provide a progress report on the ratification and domestic implementation of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

The bill concerning adherence to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly on 14 December 1973, was brought to the National Assembly on 30 October 2002. A rapporteur was appointed on 4 December 2002 and the Committee on Foreign Affairs of the National Assembly should consider the bill in the coming weeks before submitting it to the National Assembly for a vote.